No. 17,585

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAY B. WOODBURY, Appellant

v.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General,

SIDNEY I. LEZAK,
Acting United States Attorney,

ALAN S. ROSENTHAL,
JOHN W. BOULT,
Attorneys, Department of Justice,
Washington 25, D.C.

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JURISDICTIONAL STATEMENT

This suit was filed on September 30, 1957, in the United States District Court for the District of Oregon against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq. On February 14, 1958, the Government filed a motion to dismiss the complaint and in the alternative for summary judgment, alleging, inter alia, that the suit was not within the purview for the Federal Tort Claims Act and therefore the court was without jurisdiction(R. 17-19). On February 24, 1961, the district court dismissed the complaint on the ground that it had no jurisdiction of the claim under the Tort Claims Act (R. 117-118). Notice of appeal was filed on April 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

STATEMENT OF THE CASE

I. Summary

In general, the present suit arises out of a borrower-lender relationship between appellant and the Housing and Home Finance Agency (referred to hereinafter as HHFA), an agency of the United States Government. This relationship was created in January 1953 when appellant, who had become interested in sponsoring a housing project near a military installation in the vicinity of Kodiak, Alaska, applied for, and was granted, a construction loan by HHFA in the sum of $4,230,900. In order to describe with clarity the precise nature of appellant's various claims urged against the Government in the court below, there is set forth below a detailed discussion of (1) the negotiation with preceded the basic loan agreement and supplementary agreements, (2) the nature of the loan agreement and its pertinent conditions, (3) the difficulties which arose in completing the housing project and repaying the loan, and (4) the subsequent negotiations, conducted in an effort to rescue the housing project from these difficulties, which culminated in the so-called "completion agreement" between appellant, his corporation, subcontractors, and creditors of the project. None of the recited facts are in dispute; indeed most appear in the Agreed Statement of Fact which was incorporated in the pretrial order (R. 46-68).

II. The Alaskan Project

A. Preliminary Negotiations

In 1949 discussions took place between officials of the Navy, the Alaska Housing Authority, and the City of Kodiak, Alaska, concerning the possibility of securing additional off-base housing for naval personnel connected with the Naval Base in Kodiak. During 1950 and 1951, arrangements were made to transfer to the City of Kodiak certain Government land, as a site for this housing project to be built by a sponsor selected by the City of Kodiak. During this same period the site was surveyed and some engineering performed on behalf of one Raymond Lewis of Los Angeles, California, a proposed sponsor of the project. However, in late 1951, Mr. Lewis abandoned interest in the project. (R. 53-54)

Also during 1951, appellant became interested in the promotion of a prefabricated house panelling of recent invention. Consequently, in late 1951 he financed a trip by the inventor, and others, to Alaska to investigate the possibility of selling the panelling there. In the course of this promotion, appellant's associate approached the Mayor of Kodiak, and as a result appellant became interested in becoming the sponsor of the off-base housing project near Kodiak. (R. 54)

Accordingly, in February 1952, Aleutian Homes, Inc., was incorporated under the laws of the State of Oregon for the purpose of sponsoring the project. Appellant became the president

of Aleutian Homes, Inc., and the owner of virtually all of the outstanding shares of stock issued by the corporation. In February or March 1952, the City of Kodiak approved Aleutian Homes, Inc., as the sponsor of the housing project, and the site land was subsequently conveyed to the corporation. (R. 54)

B. Financing of the Project

The financing of the project became divided into two phases which may be termed long-term financing, and short-term financing. The long-term financing was to be accomplished under the provisions of Section 203 of Title II of the National Housing Act, as amended. Pursuant thereto the Brice Mortgage Company was selected to act as the permanent mortgagee by receiving long-term mortgages on each house included in the project. In order to assure the future marketability of these mortgages, Brice Mortgage Company applied to the Federal Housing Administration (referred to hereinafter as FHA) for a commitment to insure the mortgages. In early 1952, FHA appraised the value of the project at $5,904,250 and, in April 1952, issued its conditional commitment, to expire April 24, 1953, to insure the mortgages in the amount of $4,706,400 or 80% of the appraised value. Also in 1952, the Federal National Mortgage Association (referred to hereinafter as FNMA) issued a conditional commitment, to expire May 15, 1953, to purchase at par the individual long-term mortgages as they were obtained by Brice Mortgage Company and insured by FHA. The funds received

by Aleutian Homes, Inc., through this long-term financing were to be used in large part to repay an interim short-term construction loan. (R. 55-56)

The second phase of the financing of the project was necessitated by the need for immediate funds required for the construction of the project prior to obtaining the long-term financing. Being unable to obtain from private sources the financing required for the construction of the project, Brice Mortgage Co., and Aleutian Homes, Inc., began negotiations with the Community Facilities and Special Projects Branch of the HHFA. Aleutian Homes, Inc., filed a formal loan application in late 1952. The application was approved through a Loan Authorization signed by the Administrator of HHFA in January 1953. (R. 57). This document authorized a loan in the total amount of $4,230,900, or 90% of the FHA and FNMA commitments, to be used solely to finance the housing project. The loan authorization, by its terms, contemplated the negotiation and execution of a number of supporting documents prior to the disbursement of any portion of the loan. (R. 57)

Thereafter, on April 27, 1953, the basic loan documents were executed. These included (1) the Building and Loan Agreement, (2) the Loan and Disbursement Agreement, (3) Borrower's Promissory Note in the amount of $4,230,900 signed by Aleutian Homes, Inc., R. B. Woodbury, President,

(4) Guaranty by R.B. Woodbury covering performance of the construction contract by Kodiak Construction Company,[1] the general contractor for the housing project, which contract was contemporaneously assigned by Aleutian Homes to HHFA, (5) Guaranty by R.B. Woodbury covering performance of the Loan Agreement, (6) Standby Agreement executed by R.B. Woodbury, (7) general contract between Aleutian Homes, Inc., and Kodiak Construction Company, (8) Supply contract between A.B. Carlton, d/b/a/ Carlton Lumber Company and Kodiak Construction Company for the prefabricated houses at a specified price per house, (9) Erection Contract between Kodiak Construction Company and Pacific Alaska Contractors, Inc., to prepare the site and lay house foundations. (R. 57-59) As a condition precedent to the disbursement of any part of the loan, each of the above-listed construction contracts was assigned to the Administrator of the HHFA together with the stock of Aleutian Homes, Inc. (R.57) Also, as a condition to the granting of the loan, Aleutian Homes agreed to advance all sums necessary for the completion of the project in excess of the amount of the loan, and at the option of HHFA were subject to deposit with HHFA sums to insure cash resources adequate for that purpose. (R. 57)

1/ This corporation was formed under the laws of the State of Oregon to act as general contractor in the construction of the project. Appellant was the president of this corporation and the owner of a substantial amount of its outstanding stock.

C. Construction Activities

Based upon these financial arrangements, construction on the project began. Almost immediately, however, in the summer of 1953, certain difficulties were encountered regarding the preparation of the site. In August 1953 the site construction contract between Kodiak Construction Company and Pacific Alaska Contractors, Inc., which contract had been assigned to HHFA on April 27, 1953, was terminated. (R. 59) In September 1953 the site preparation operation was taken over by Kodiak Construction Company. (R. 59-94)

On November 6, 1953, Pacific Alaska Contractors, Inc. filed a lien against the project for more than $150,000 (R. 95). Thereupon, construction came to a standstill with the project approximately 75 per cent completed.

Repayment of the HHFA loan became in default and HHFA advised appellee of his obligation under his personal guarantee to provide additional funds to complete the project free of all liens. Appellee informed HHFA that he was unable to meet this obligation. (R. 60)

D. The Completion Agreement.

In November 1953, with loan payments in default, the HHFA could have declared expended loan funds, and interest, due and payable. However, the Government had no disposition to exercise its right of foreclosure if there was any reasonable means of overcoming the difficulties upon which the project had foundered. The project sponsor (Aleutian Homes) its president (~~appellee~~ Appellant) the general contractor, subcontractors, and other project creditors,

were equally interested in keeping the project, and its financing, alive, if at all possible. To this end negotiations were begun between the sponsor and the project creditors, which resulted in a plan prepared by Aleutian Homes' attorney which was presented to creditors for acceptance and to HHFA to serve as a basis for further disbursement of undisbursed loan funds.2/ Meetings were conducted concerning this plan during which it became manifest that (1) Aleutian Homes owed creditors large amounts of money, and (2) owed HHFA principal and interest on the loan, and (3) the project could not be completed within the contract time. The result of the negotiations was the execution of a completion agreement (Exhibit 583/1-140) by appellant, Aleutian Homes, Inc., Kodiak Construction Company, the Subcontractors, corporate sureties, guarantors, stockholders, permanent mortgagee, and principal creditors and claimants against the project.3/

In the completion agreement itself it was stated that the circumstance which prompted the agreement was the unwillingness of HHFA to make further loan disbursements in view of unpaid creditor

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2/ At the time default occurred, construction ceased, and disbursement of funds terminated, approximately $3,330,062 had been disbursed by HHFA to Aleutian Homes under the Building and Loan Agreement.

3/ Neither HHFA nor any other Government agency was listed in this completion agreement as a party thereto, nor was the document signed by any Government official.

iens filed against the project, and other defaults. The avowed urpose of the agreement was to induce HHFA to make further loan isbursements.

In order to accomplish this the parties to the agreement greed therein to a schedule of the amounts of their then existng claims against the project, agreed to a schedule for payment f the costs of completing the project including repayment of ne interim loan, and agreed to refrain from legal proceedings o enforce claims while the agreement was in effect. (Exhibit 33/1-140).

The efficacy of these agreements was conditioned upon HHFA's illingness to modify appropriately the loan disbursement procedures, ttend the maturity date of the loan, and defer collection of terest until completion of the project. Further, also as a rt of the completion agreement, appellant, individually, agreed provide necessary overhead expenses to complete the project, d to preserve the FHA and FNMA mortgage commitments, in the proximate amount of $15,000 per month.

Finally, the parties agreed to the appointment of a Project Manager and a Construction Superintendant acceptable to the HHFA, o would be "vested with full and exclusive authority" to take ar and all actions in connection with the project. The Project Manager was to be subject to removal and replacement by HHFA at ar time. His compensation was to be considered an overhead ense payable out of the funds to be supplied by Woodbury's guarantee.

The agreement also contained the following provision:

> The obligations of any party signatory hereto shall not be released, discharge, or in an way affected, nor shall claimants or any other parties signatory have any rights or recourse against lender (HHFA) by reason of any action lender may take or omit to take under the foregoing powers; nor by reason of any action taken by lender which in its opinion may be necessary to keep the project free from liens.

E. Operations Under the Modified Loan Agreement

On the basis of the foregoing arrangements, construction was resumed and loan disbursements continued. Under the amended disbursement procedures, project funds were to be expended solely by the Project Manager in paying the cost of completion and in satifying the claims scheduled for payment in the completion agreement. (R. 60-61)

However other expenditures were made by appellant, without knowledge of the Government, beginning on June 2, 1954 (R. 66). These were payments made to the Bank of California on a claim which was part of the completion agreement. The payments continued through July 6, 1956 and through a period when the project was in financial difficulties. Although obligated under his overhead agreement to pay $15,000 per month for administrative expenses, and to maintain FHA and FNMA commitments, appellant ceased to make such payments (R. 67) although he continued to make payments to the Bank of California in disregard of other claimants. Thus, with the mortgage commitments to expire in June 1955, appellant, on May 18, 1955, paid the Bank of California $59,731.43 (R. 66). Again, on June 13, 1955, the

virtual eve of commitment expiration, he paid the Bank of California $2,352.75 (R. 66).

Thus, permanent individual mortgages were not taken out on any of the houses and the FHA commitment to insure the FNMA commitment to purchase such mortgages expired and were not renewed by the payment of appropriate fees.

On or about June 11, 1957 foreclosure proceedings were instituted by the United States in the United States District Court for the District of Alaska pursuant to the deeds of trust securing the indebtedness of Aleutian Homes under the Building and Loan Agreement and promissory note.

III. Nature of Appellant's Claims

The complaint filed by appellant in the district court under the Tort Claims Act sets forth six "Causes of Action" against the United States, each alleging damages in a specified amount. These claims may be summarized as follows:

1. HHFA breached a fiduciary duty owed to appellant in failing to secure long-range financing of the housing project by reason of which appellant suffered damage in the amount of $75,000, this sum representing the funds advanced by appellant under his overhead agreement.

2. HHFA failed to pay the claims of the Bank of California by reason of which appellant, under his liability as an accommodation endorser, suffered damages in the amount of $164,594.80.

3. HHFA failed to pay a claim of the General Casualty Company of America, as a result of which appellant by reason of his personal guaranty of this claim, suffered damages in the amount of $35,955.02.

4. HHFA failed to secure long-term financing for the project by reason of which appellant suffered damages in the amount of $150,000, this sum representing funds advanced by appellant between 1951 and 1953 in preparation for the project.

5. HHFA failed to secure long-term financing for the project by reason of which appellant suffered damages in the amount of $9,297.04, this sum representing claims satisfied by appellant subsequent to the completion agreement.

6. HHFA failed to secure long-term financing for the project, and wrongfully seized appellant's bank account and foreclosed on appellant's equity in the project, by reason of which appellant suffered damages in the amount of $428,127, this sum representing the alleged value of appellant's equity in the project.

IV. Proceedings in the District Court

The Government responded to the complaint by filing a Motion to Dismiss and in the Alternative for Summary Judgment (R. 17-19). In support of this motion, appellee urged that the statute of limitations had run on appellant's claims, and that the claims were not within the perview of the Federal Tort Claims Act.

On April 28, 1958, after the Government's alternative motion had been withdrawn, the district court denied the motion to dismiss with leave to renew the motion at the time of the pretrial (R. 19).

On June 2, 1958, the Government filed its answer (R. 20-33) in which it denied each of appellant's substantive allegations, and renewed its contentions that the complaint was not cognizable under the Federal Tort Claims Act and that the complaint was barred by the statute of limitations.

On July 15, 1960, the district court entered a pretrial order (R. 33-78) in which it ordered that the Government's motion to

dismiss be segregated and first heard. The court indicated that, if the complaint was not dismissed on that basis, it would then proceed to try the segregated issue of whether HHFA became appellant's fiduciary (R. 77).

On November 4, 1960, the court ordered that decision on the motion to dismiss be reserved, and that trial be held on the controverted issue of an alleged fiduciary status (R. 78-79).

On February 8, 1961, after hearing, the court held that it had no jurisdiction over the complaint under the Federal Tort Claims Act (R. 116). This appeal followed.

STATUTE INVOLVED

The Federal Tort Claims Act, Act of June 25, 1948, 62 Stat. 933, 982, 28 U.S.C. 1346(b), 2671, et seq., as amended, provides in pertinent part as follows:

> 1346(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> 2679. Exclusiveness of remedy
>
> (a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

2680. Exceptions

The provisions of this chapter and Section 1346(b) of this title shall not apply to:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

SUMMARY OF ARGUMENT

I

The waiver of sovereign immumity contained in the Tort Claims Act does not extend to claims based on the allegedly wrongful failure of employees of the Government to fulfill obligations said to arise by reason of a contractual relationship between the Government and the plaintiff. On the contrary, the Tucker Act provides the sole basis for suit on such claims and, where the recovery sought exceeds $10,000, the Court of Claims is the sole forum. Since it is clear in this case that appellant's cause of action is bottomed entirely on a breach of duties which appellant claims arose from the completion agreement, the district court lacted jurisdiction to entertain it under the Tort Claims Act.

II

Even if the contractual footing of appellant's claim were ignored, Tort Claims Act jurisdiction would still be lacking. For the claim comes within two of the exceptions contained in 28 U.S.C. 2680.

A. Section 2680(a) bars, inter alia, claims based upon the exercise of a discretionary function. An examination of the statutory provisions underlying HHFA's lending activities reveals that Congress conferred broad discretion upon the agency in the conduct of those activities. All of the actions complained of

by appellant were performed in the exercise of that discretion and involved policy judgments as to the most appropriate manner in which to carry out the Agency's statutory functions.

B. The claim is also barred by the Section 2680(h) exclusion of claims arising out of interference with contract rights. That exclusion has been judicially interpreted to apply not only to interference with existing contractual rights, but also to interference with prospective or potential economic advantage. And the gravamen of appellant's complaint is that the alleged wrongful acts of HHFA deprived him of the benefits of long-term financing arrangements.

Moreover, the abuse of process and malicious prosecution exceptions in the same subsection apply, respectively, to the allegation that the Aleutian Homes' bank account was wrongfully seized and the complaint of an improper commencement of foreclosure proceedings against the project.

ARGUMENT

I

APPELLANT'S CLAIM ARISES FROM CONTRACT AND IS THEREFORE OUTSIDE THE SCOPE OF THE FEDERAL TORT CLAIMS ACT.

1. As its very title reflects, the Tort Claims Act was designed, with certain exceptions, to "remove the sovereign immunity of the United States from suits in tort* * *." See, Richards v. United States, 369 U.S. 1,6. That claims based upon breach of contract are wholly alien to the Tort Claims Act is beyond question. As early as 1887, Congress surrendered the Government's sovereign immunity on claims based upon contracts which are express or implied in fact by enacting the Tucker Act.4/ Today the Tucker Act constitutes the sole basis for a suit against the United States sounding in contract and the district court's jurisdiction under that Act is very limited. As recently stated in Drake v. Treadwell Construction Company, 299 F. 2d 789,791 (C.A. 3):

> The generalized consent of the United States to be sued in contract appears in the Tucker Act, 28 U.S.C. §1491. But the Tucker Act divides jurisdiction over claims against the United States, whether founded in express or implied contract, between the court of claims and the district courts. Only claims for less that $10,000 are cognizable in the district courts. 28 U.S.C. §1346(a)(2).

4/ Act of May 3, 1887, 24 Stat. 505, 28 U. S. C. 491, as amended.

Thus, by the enactment of independent, mutually exclusive, consenting statutes, the Congress has drawn a clear and significant line of distinction between governmental liability in tort on the one hand, and contract on the other. It follows that, when the Tort Claims Act refers in 28 U.S.C. 1346(b) to a "negligent or wrongful" act or omission of a Government employee, it contemplates negligent or wrongful conduct in the tort sense, and not such conduct which amounts to nothing more a breach of obligations which arise, if at all, solely by reason of a contractual relationship between the United States and the plaintiff. For any other reading of the jurisdictional keystone to the Act would essentially obliterate that line of distinction.

2. Whether a particular claim sought to be asserted under the Tort Claims Act is based upon a right in tort, rather than one created by contract, must be determined on the basis of the nature of that claim. Stated otherwise, the particular label that the claimant may choose to place upon the claim -- or the words that are used in the complaint in describing it-- are not decisive. As has been generally recognized by the courts, Congress did not intend that the bounds of the waiver of immunity in the Tort Claims Act be conditioned by linguistic considerations. Rather, as the Tenth Circuit has pointed out in a case under that Act, the obligation of the court is to "look beyond the literal meaning of the language (used in the pleadings) to ascertain the real cause of complaint". Hall v.

United States, 274 F. 2d 69, 71. See also Klein v. United States, 268 F. 2d 63, 64 (C.A. 2); Miller Harness Co. v. United States, 241 F. 2d 781, 783 (C.A. 2); Stepp v. United States, 207 F. 2d 909 (C.A. 4); Broadway Open Air Theatres, Inc. v. United States, 208 F. 2d 257 (C.A. 4).

We submit that scrutiny of the present allegations will reveal that appellant's claim is founded solely on a breach of asserted contractual obligations. Indeed, the fundamental contractual character of the claim is clearly betrayed by the basic allegations (R. 7-9): (1) that HHFA "entered into a completion argeement" with appellant "in which HHFA undertook to pay all creditors" and to "complete construction of the project", (2) that "Pursuant to said completion agreement" HHFA assumed control over the project, (3) that "in carrying out said completion agreement" HHFA selected a project manager, and directed disbursement and receipt of all project funds, (4) that "in the carrying out of said completion agreement" HHFA permitted the commitments of FHA and FNMA, with respect to long-term financing, to terminate, and (5) that appellant in reliance upon the "completion agreement" advanced certain funds to the project manager which were to be repaid out of FNMA funds. The damage complained of is asserted to have resulted from the manner in which HHFA performed its purported obligations under the completion agreement.

In short, it is abundantly clear that HHFA's duties toward appellant begin and end with the completion agreement--a contract. Indeed, as appellant himself concedes in the conclusion of his brief, (p. 71) the entire basis for the present claim is that: "The completion agreement and the acts thereunder created duties and obligations, as well as rights, on the part of both appellant and the government." Thus, the rights which appellant asserted in this action arise solely from contract, and being in excess of $10,000 in amount, can be asserted only in a Tucker Act suit in the Court of Claims.

II

IF APPELLANT'S COMPLAINT ASSERTS A RIGHT IN TORT, THE CLAIM IS BARRED BY 28 U.S.C. 2680(a) & (h).

In Point I, we have shown that, since appellant's complaint is, in essence, that the United States failed to fulfill contractual obligations running to appellant, Tort Claims Act jurisdiction is absent. We now will demonstrate that, even if the contractual footing to the claim were disregarded, appellant's position would not be improved. For the Tort Claims Act does not represent a total waiver of the Government's immunity from suit in tort. On the contrary, Congress expressly set forth in 28 U.S.C. 2680 several specific types of claims in tort as to which the waiver would not apply.

If appellant's claim is deemed to be in tort, it is precluded by subsections (a) and (h) of that Section. They provide, in material part, that the Act does not extend to:

> (a) Any claim based upon * * * the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.
>
> (h) Any claim arising out of * * * malicious prosecution, abuse of process * * * misrepresentation, deceit, or interference with contract rights.

A. The Present Claim is Based Upon the Exercise of a Discretionary Function Within the Meaning of 28 U.S.C. 2680(a)

1. The HHFA was created by the Reorganization Plan No. 3 of 1947, 61 Stat. 954, 5 U.S.C. 133y-16. Under this plan the various functions and programs of the Government related to housing

were consolidated within the HHFA. Among the functions alloted to HHFA was that of assuring that the nation's industrial capacity for the production of prefabricated housing to be available for national defense, by making loans to business concerns involved in the production and distribution of such housing. See, 12 U.S.C. 1701g-1. In connection with this loan program, 12 U.S.C. 1701g-2(2) empowers the HHFA Administrator to:

> * * *take any and all actions determined by him to be necessary or desirable in making, servicing, compromising, modifying, liquidating, or otherwise dealing with or realizing on loans* * * .

Further, by 12 U.S.C. 1749a(c)(4), (8) and (9), the Administrator is empowered to:

> (4) foreclose on any property or commence any action to protect or enforce any right conferred upon him by any law, contract, or other agreement* * *.
>
> (8) * * * Consent to the modification, with respect to rate of interest, time of payment of any installment of principal or interest, security, or any other terms of any contract or agreement to which he is a party or which has been transferred to him* * *.
>
> (9) * * * include in any contract or instrument made pursuant to this subchapter such other convenants, conditions, or provisions as he may deem necessary to assure that the purposes of this subchapter will be achieved.

These provisions constitute the statutory basis for the participation of the HHFA in the initial loan negotiations, the basic building and loan agreement, and the subsequent modification of the loan documents, including the so-called completion agreement from which appellant contends the Government's liability arises.

These statutory provisions grant the Administrator broad discretion in fulfilling his statutory duties. They carve out broad areas within which the Administrator is authorized to use his judgment in determining the best course to follow.

2. There can be no question that the acts of which appellant complains were all based upon the Administrator's exercise of the discretion given him by statute. For example, the complaint alleges (R. 7) that HHFA entered into a completion with appellant in which it took complete control over the project and undertook to pay all creditors then existing, and to complete construction of the project. This, of course, took place at a time when the housing project was in jeopardy and when appellant was in default on the basic loan. (R. 59-61) In an effort to salvage the project, and in connection with the completion agreement, HHFA agreed to extend the maturity date of the loan and to defer the collection of interest until the project was completed. The completion agreement, then, represented, in the fullest sense, a modification of the existing loan conditions. Surely, therefore, the HHFA's participation in the completion agreement procedures was but an exercise of the Administrator's power to "take any and all actions determined by him to be necessary or desirable in making, servicing, compromising, modifying, or otherwise dealing with or realizing on loans", (12 U.S.C. 1701g-2(2), supra, p. 22.) and his power to "consent to the modification" of the "terms of any contract or agreement to which he is a party". (12 U.S.C. 1749a(c)(4), supra, p. 22)

The insistence, if any, by HHFA upon control over the construction of project as condition to the further advancement of loan funds and its subsequent actions taken in the exercise of that control was surely an exercise of the Administrator's power to "include in any contract or instrument" such "conditions" as he determines to be necessary to accomplish the purposes of the loan program. 12 U.S.C. 1749a(c)(9), supra, p. 22 . The allegation (R. 9) that the Government wrongfully seized the Aleutian Homes bank account, and wrongfully instituted foreclosure proceedings is clearly based upon an act performed under the Administrator's power to "foreclose on any property or commence any action" to enforce the rights conferred upon the Administrator by contract or otherwise. 12 U.S.C. 1749a(c)(4), supra, p. 22.

It is, of course, eminently reasonable and necessary that the head of a Government lending agency be given broad discretion in carrying out a loan program. Such activity inherently requires the daily exercise of judgment and policy decision in order to cope with the many unpredictable difficulties which invaribly arise and to protect the federal funds which are employed. Indeed, such programs require, and this case involves, precisely the kind of discretion described by the Supreme Court in Dalehite v. United States, 346 U.S. 15, 34, as being outside the scope of the Tort Claims Act:

> the "discretion" protected by the section * * * is the discretion of the executive or administrator

> to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law.

Later, in the same context, the Court said:

> Where there is room for policy judgment and decision there is discretion. 346 U.S. at 36. 5/

In addition to the landmark Dalehite decision, there are many other cases in which Section 2680(a) was held to bar claims based, as the one here involved, upon the allegedly improper execution of activities involving policy determinations or the exercise of broad judgment. 6/ Of course, these cases involved

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5/ There is no merit to appellant's suggestion (Br. p. 40) that that portion of Dalehite relating to Section 2680(a) was overruled in Indian Towing Co. v. United States, 350 U.S. 61, and Rayonier Inc. v. United States. 352 U.S. 315. Neither of those cases involved the applicability of the "discretionary function" exception. Rather, in both, the only part of the Dalehite holding under consideration was that the dealing with the liability of United States for uniquely governmental activities such as fire-fighting. See, 346 U.S. at 43-44. As recently at June 27, 1962, the Third Circuit passed on this very point. In holding that Section 2680(a) barred a claim based upon the Federal Government's participation in the design of a highway built with federal financial assistance, the court quoted from that part of Dalehite which concerned Section 2680(a) and pointed out in a footnote that: "Although there are portions of the Dalehite opinion which are no longer authoritative, we do not read Rayonier, Inc. v. United States, 352 U.S. 315 (1957) or Indian Towing Co. v. United States, 350 U.S. 61 (1955), as having retracted the language quoted." Mahler v. United States, (C.A. 3, No. 13726), slip opinion, p. 17, fn 13.

6/ See, e.g., Goddard v. District of Columbia Redevelopment Land Agency, 287 F. 2d 343 (C.A.D.C.); Chournos v. United States, 193 F. 2d 321 (C.A. 10), certiorari denied, 343 U.S. 977; Schmidt v. United States, 198 F. 2d 32 (C.A. 7), certiorari denied, 344 U.S. 896; Weinstein v. United States, 244 F. 2d 68 (C.A. 3), certiorari denied, 355 U.S. 868; Coates v. United States, 181 F. 2d 816 (C.A.

divers factual situations, some more closely akin to the present case than others. However, the common thread which unites all of them is found in the fundamental proposition articulated by the court in Coates v. United States, 181 F. 2d 816, 818 (C.A. 8), as follows:

> The Congress had a sound basis for use of the words (discretionary function or duty) in the Exceptions of the Act and used them in recognition of the separation of powers among the three branches of the Government and the considerations of public policy which have moved the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion or judgment.

It is submitted that a proper application of the foregoing principle compels the conclusion that the claims in the present case were barred by the discretionary function exception of Section 2680(a).

Appellant cannot escape the fact that, as we have seen, recognition of the complexity of the federal housing program, and of the compelling need for immediate day-to-day and case-to-case decision and action, the HHFA Administrator was endowed by Congress with broad authority to exercise his own best judgment and discretion in "making, servicing, compromising, modifying, liquidating, or otherwise dealing with or realizing on loans." Once again, appellant's complaint is wholly addressed in the manner in which the administrator and his subordinates exercised that discretion.

B. The Present Claim is Based Upon Alleged Interference with Contract Rights, Malicious Prosecution, and Abuse of Process within the Meaning of 28 U.S.C. 2680(h)

As heretofore noted, 28 U.S.C. 2680(h) excluded claims based, inter alia, upon interference with contract rights. As has been recognized by the Third Circuit, this exclusion embraces not only claims founded upon interference with existing contractual relations but also wrongful acts which are alleged to have interfered with prospective or potential advantage from business relations with third persons. Dupree v. United States, 264 F. 2d 140 (C.A. 3). Thus, in Dupree, the court held that Section 2680(h) barred an action brought by a licensed shipmaster based upon the allegedly negligent withholding of a security clearance by the Coast Guard. The gravamen of the complaint had been that, as a result of the withholding, the shipmaster was unable to obtain employment.

The Dupree holding is plainly applicable here. The gravamen of appellant's complaint is that, as a result of the allegedly wrongful acts on the part of HHFA employees, appellant was unable to obtain the benefits of the long-term financing for the project for which he had obtained conditional commitments from FHA and VNMA. In other words, the claim is that HHFA's conduct occasioned an interference with an economic advantage which appellant anticipated would be the end product of its activities in connection with the Kodiak project. And see also, Fletcher v. Veterans Administration, 103 F. Supp. 654 (E.D. Mich.); Builders Corporation of America v. United States, 148 F. Supp. 482 (N.D. Cal), reversed

on other grounds, 259 F. 2d 766 (C.A. 9); Roxfort Holding Co. v. United States 176 F. Supp. 587 (D.N.J). As the court pointed out in Builders (148 F. Supp. at 484):

> The alleged wrongful act of the Base Commander for which plaintiffs seek a recovery * * * appears to be the tort of "interference with prospective advantage" (Prosser on Torts, p. 745 [2d Ed. 1955]), sometimes labeled "interference with prospective contracts or business relations" * * * Since Congress has decided not to surrender the immunity of the United States from tort actions based on interference with contract relations, 28 U.S.C. §2680(h), the essential issue which this Court must decide, then, is whether the tort of interference with prospective advantage or prospective contracts is properly includable within the aforementioned exception to the Tort Claims Act. It would seem to be quite illogical to conclude that Congress intended to exclude one tort from the operation of the Act, and, at the same time, waive the Government's immunity from actions sounding in a substantially identical tort; the distinction between the two being one of degree, only, in the elements necessary to establish liability."

Moreover, to the extent that the complaint is based upon the allegation that (R. 9-10):

> [T]he HHFA, its agents and employees * * * in breach of said fiduciary duties and obligations * * * did seize the bank account of Aleutian Homes, Inc * * * and * * * Commenced foreclosure proceedings * * * against Aleutian Homes, Inc * * * to collect the balance of moneys due on the interim loan.* * *

it is barred by other exclusionary provisions in 28 U.S.C. 2680(h). The alleged seizure of the corporation bank account, if wrongful, amounted to an abuse of process. Prosser on Torts (2d Ed., 1955) pp. 667-669. And, since the majority rule in the United States is that the tort of malicious prosecution embraces th

institution of civil as well as criminal proceedings, (Ibid, p. 662) the allegedly wrongful commencement of foreclosure proceedings comes within the exclusion of such claims.

It is also worthy of note that, while Section 2680(h) is not limited in scope to deliberate torts (United States v. Neustadt, 366 U.S. 696), the legislative purpose was to exclude all such torts from suit under the Act. 7/ In this case, the complaint is not based upon proportedly negligent or inadvertent conduct. Rather, the allegedly wrongful acts upon the part of HHFA were intended to accomplish the ends which were achieved. For example, the foreclosure proceedings were deliberately instituted to enforce the Government's rights under the deed of trust securing the interim loan and appellant's promissory note. The bank account of Aleutian Homes was seized for the purpose of applying the funds to the amount due the United States from appellant. Further, the payment, during the completion period, of some claims by the project manager and the non-payment of others was consciously done in a deliberate attempt to achieve the purposes of the agreement, and to complete construction of the project.

7/ See H. Rept. 2246, 77th Cong. 2d Sess.; Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 590, 76th Cong., 3rd Sess., p. 39; Hearings before the House Committee on the Judiciary of H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., pp. 33-34.

For the foregoing reasons we respectfully submit that the district court was clearly correct in its conclusion that it lacked jurisdiction over appellant's claim. To avoid any possible misunderstanding, we feel compelled to add -- even though we believe the court need not reach the point -- that appellant is in error in its statement (Br. p. 22) that it is undisputed that FHFA breached a fiduciary duty arising by reason of its contractual relationship with appellant. On the contrary, we strenously deny the existence of any such duty and, if one did exist, its breach.

It is true that we have not developed the point in this brief as an alternative basis for affirmance of the judgment in the Government's favor. We do not think, however, that there was any occasion to do so. The district court's expression of opinion on the subject was purely gratuitious in view of its disposition of the litigation and, accordingly, the court stated (R. 109) that it did not deem it "necessary or desirable" to make detailed findings in support of its conclusion. It seems likely that this court in no event would wish to consider the question without such findings. Further the documentary evidence bearing on the issue is voluminious. Any demonstration of the insubstantiality of appellant's claim on its merits thus would have required the undue burdening of the record before this court on an appeal from a judgment of dismissal for lack of jurisdiction.

Brief note must also be made of appellant's suggestion that, if this court agrees with us that the district court lacked jurisdiction over its claim, the suit should be transferred to the

Court of Claims. Appellant has given no reason why this Court should invoke 28 U.S.C. 1406(c) (Supp II) to order such a transfer and we know of none.

CONCLUSION

In the light of the foregoing, it is respectfully submitted that the dismissal order of the District Court should be affirmed.[8]

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

SIDNEY I. LEZAK,
Acting United States Attorney.

ALAN S. ROSENTHAL,
JOHN W. BOULT,
Attorneys, Department of Justice,
Washington 25, D.C.

8/ Of course, appellant's contention (Appellant's brief, pp 29-30) that the present suit should lie apart from the provisions of the Tort Claims Act, since the HHFA Administrator is entitled by statute to "sue or be sued" (R. 82) constitutes no valid reason whatsoever for overturning the district court's order. In the first place, 28 U.S.C. 2679(a) provides that the Tort Claims Act shall constitute the exclusive remedy against the Government for suits in tort, regardless of the "sue and be sued" attributes of the several government agencies. In the second place, the present suit was a suit against the United States only, and the HHFA Administrator was never made a party to it. Under such circumstances, the "sue and be sued" characteristics of an alleged offending agency cannot be used to sustain a suit against the United States, United States v. Waylyn Corp., 130 F. Supp. 783, aff'd 231 F. 2d 544 (C.A. 1), cert. den. 352 U.S. 827.